Supreme Court, U.S.
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No. 04-13

In The Supreme Court of the United States

ALLEN OIL & GAS, L.L.C.,

Petitioner,

v.

MICHAEL KLISH, BRUCE JOHNSON, DANIEL SKRABACZ AND ADRAN PHILLIPS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Tenth Circuit hold Allen Oil & Gas, L.L.C. (herein after "Allen Oil & Gas") to an excessively high standard of pleading when it dismissed its Complaint for failing to sufficiently allege that the Respondents personally participated in the deprivation of rights being complained of?

2. Should Allen Oil & Gas have been afforded an opportunity to amend its complaint before it was dismissed?

LIST OF ALL PARTIES TO THE PROCEEDING

The names of all the parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of this case.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, none of the parties have a parent company or non-wholly owned subsidiary.

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit in *Allen Oil & Gas, L.L.C. v. Klish*, 113 Fed. Appx. 869 (10th Cir. 2004), *cert. filed*, decided on October 26, 2004. Appendix at 1a. The district court's unreported order in 01-CV-1811, dismissing Allen Oil & Gas' claims for failure to state a claim for which relief may be granted and denying its request for leave to file an amended complaint was filed on January 30, 2003. Appendix at 8a. An order transferring venue for the case from the Southern District of Texas to the District of Colorado was signed on September 4, 2001. Appendix at 11a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was decided on October 26, 2004, and Allen Oil & Gas' request for a rehearing was denied on December 29, 2004. Appendix at 20a. There has been no order granting an extension of time to file a petition for writ of certiorari. There has been no cross-petition for writ of certiorari filed. Jurisdiction to review the decision in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1). This case does not require notification under Sup. Ct. R. 29.4(b) or (c).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitutional and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Fed. R. Civ. P. 12(b)(6) provides:

> Every defenses, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading therein if one is required, except that the following defenses may at the option of the

pleader be made by motion: failure to state a claim on which relief can be granted. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets for a claim for which relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief may be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

Fed. R. Civ. P. 15(a) provides:

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleadings only by leave of court or by written

> consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

STATEMENT OF THE CASE

Statement of the Facts

In 1997, Allen Oil & Gas, purchased the working interest in two oil fields located in Colorado, known as the "Tow Creek Field" and the "Buck Peak Field." When Allen Oil & Gas purchased these oil fields, several of the wells therein had been cited for violating various Colorado state regulations governing the operation of oil wells. These citations each: (1) identified a particular well; (2) described how the well allegedly did not comply with state regulation; (3) identified the regulation allegedly violated; (4) identified the corrective action required; and (5) established a deadline for bringing the well into compliance with regulations.

In 1999, Allen Oil & Gas was summoned to attend a meeting of the Colorado Oil and Gas Conservation Commission. The announced purpose of the hearing was to consider the alleged failure to remedy certain violations of state regulations governing the operation of some (but not all) of Allen Oil & Gas' wells.

An agent of Allen Oil & Gas appeared on its behalf before the Commission, and he requested and received a continuance to allow it to hire a lawyer. However, as a condition of receiving a continuance, Allen Oil & Gas was made to shut in all of the wells in the Tow Creek Field, regardless of whether the well was a subject of the hearing.

When the hearing reconvened, Allen Oil & Gas brought an attorney who was not licensed to practice in Colorado. Citing an administrative rule that does not permit an attorney who is not licensed in Colorado to represent a party before the Commission, the Commission would not recognize him as Allen Oil & Gas' representative. At the conclusion of the hearing, certain findings about regulatory violations were made, and all of the wells in the Tow Creek Field were ordered to be plugged and abandoned. This order made no distinction between wells for which findings of regulatory violations had been made and those with respect to which no regulatory violations were alleged or found.

Allen Oil & Gas retained a Colorado attorney who sought to have this order amended. At this third hearing, Allen Oil & Gas presented the reports and other evidence, and this evidence was well-received. Several Commissioners made statements indicating they were favorably disposed towards rescinding or amended the prior order.

After Allen Oil & Gas had finished presenting its evidence and arguments, the Commissioners entered executive session. While in executive session

some of the Commissioners, including some if not all of the Respondents, spoke with a civil servant employed by the Commission. After these off-the-record discussions ended, the hearing was reconvened, and the prior order was affirmed in all respects.

All of the wells in the Tow Creek Field were plugged, and the property and equipment associated with the production of oil and gas at Tow Creek (i.e., tanks, meters, pipes, etc.) were bulldozed and destroyed. The bond Allen Oil & Gas was required to post to operate in Colorado was forfeited. Finally, because Allen Oil & Gas' bond had been forfeited and because it lacked the financial resources to obtain another one, another "plug and abandon" order was entered against the wells located in the Buck Peak Field.

Proceedings Below

Allen Oil & Gas sued the Respondents (the members of the Commission who either voted against its request for an amendment of the original "plug and abandon" order or voted in favor of the original order and abstained from voting on whether it should be amended) in the District Court for the Southern District of Texas, alleging that they violated its due process rights by destroying its property without notice of an alleged violation a violation of law, based on the fact that wells were ordered plugged despite not being mentioned in the order setting the hearings on the Tow Creek Field and despite there being no determination that these wells were operated in violation of any law. The suit also alleged that Allen Oil & Gas' due process

rights were violated because the decision to plug its wells was not made by an impartial tribunal, based on the fact that the Respondents turned against it after their off-the-record discussions, and therefore were disposed against Allen Oil & Gas for reasons unrelated to any evidence or argument presented.

Allen Oil & Gas sued, and the Respondents request that venue for the suit be transferred to the District Court for the District of Colorado was granted. Appendix 11a. The Respondents subsequently asked that the suit be dismissed on several grounds, one of which was the assertion that Allen Oil & Gas failed to state a claim for which relief may be granted. The District Court held that Allen Oil & Gas had failed to state any claims for which relief could be granted. Appendix at 8a.

Allen Oil & Gas appealed this dismissal to the United States Court of Appeals for the Tenth Circuit. The Court of Appeals affirmed the District Court's decision, holding that Allen Oil & Gas had failed to explain how the Respondents had personally participated in the action complained of and therefore had failed to state a claim for which relief could be granted, and that denial of its request for leave to amend its pleadings was proper. Appendix at 1a. A request that this decision be reconsidered was denied. Appendix at 20a. From this disposition, the instant Petition for Writ of Certiorari has been filed.

Basis for Federal Jurisdiction in the Court of First Instance

The District Court had jurisdiction over the suit filed by Allen Oil & Gas pursuant to 28 U.S.C. § 1331 because the suit presents a federal question arising under 42 U.S.C. § 1983.

ARGUMENT

I. IN CONCLUDING THAT ALLEN OIL & GAS FAILED TO PROPERLY PLEAD THAT THE RESPONDENTS PERSONALLY PARTICIPATED IN THE ACTS CAUSING THE DEPRIVATION OF RIGHTS COMPLAINED OF, THE TENTH CIRCUIT BOTH IGNORED THE COMPLAINT AND IMPROPERLY IMPOSED AN ELEVATED PLEADING REQUIREMENT NOT SANCTIONED BY LAW.

Allen Oil & Gas' suit was dismissed pursuant to Rule 12(b)(6), for failing to state a claim upon which relief can be granted. Allen Oil & Gas' claims in this suit were based on the well-recognized provision of 42 U.S.C. § 1983, and so the conclusion that it had failed to state a claim was based on the determination that it failed to plead that the Respondents had "personally participated" in the events giving rise to the claim.

Dismissal for Failure to State Claim Should be Granted Infrequently

Courts that are presented with a request to dismiss a case pursuant to Rule 12(b)(6) must remember that they are the "primary guardians of the duty of fair representation," and so must construe complaints to avoid dismissal. *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970). They must accept all the plaintiff's factual allegations as true, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n. 1 (2002), liberally construing the complaint in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421-22 (1969). A complaint should be dismissed if and only if it is impossible for the plaintiff to prove any set of facts entitling him to relief, *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811 (1993), even if the court believes it unlikely that the plaintiff will prevail. *Swierkiewicz*, 534 U.S. at 515.

Personal Participation Requirement

It goes almost without saying that a defendant's liability on any claim, including a claim actionable under 42 U.S.C. § 1983 "must be based on personal involvement in the alleged constitutional violation." *Foote v. Spiegel*, 118 F.3d 1416, 1423 (10th Cir. 1997). In fact, the observation that a party must be shown to have been involved in some wrong in order to be liable for that wrong is so self-evident that the personal participation requirement has never been discussed at length by the Honorable Court; the only cases mentioning personal participation either do so in passing, *see, e.g., Director Gen. of Railroads v. Kastenbaum*, 263 U.S. 25, 27 (1923) (noting that defendant must have

personally participated in false imprisonment to be liable), or in dissent. *See, e.g., Lewis v. Hyland*, 434 U.S. 931, 932 (1977) (Marshall, J., dissenting from denial of certiorari) (noting that the Court was still defining the contours of § 1983 claims based on "varying degrees of personal participation [by public officials]").

However, courts in the Tenth Circuit have recently issued a number of decisions involving personal participation issues, cases that show the application of the personal participation rule varies considerably from case to case. For example, in a false imprisonment case, it was held that named defendants who had no involvement with the delay in releasing the plaintiff were not subject to suit. *Scull v. New Mexico*, 236 F.3d 588, 599 (10th Cir. 2000). A similar result was reached in a case where the court found the fact that one of the defendants did not arrive at the scene until after the events giving rise to the claim could not be liable because he had not personally participated in those events. *Foote*, 118 F.3d at 1423-24. Finally, where the plaintiff wholly failed to "identify or even mention" two of the defendants he sued, and where his complaint "sets forth no allegations of misconduct" regarding these defendants, dismissal was appropriate because of the lack of connection between these defendants and the constitutional violation complained of. *Dwire v. Toth*, 215 F. Supp. 2d 1128, 1130 (D. Colo. 2002), *aff'd*, 2003 WL 1822692 (10th Cir. 2003).

In contrast, in a case factually similar to this one, the court found that where the plaintiff alleged that the "defendants" did certain acts that deprived him of his

constitutional rights, this statement was sufficient to plead affirmative link between one of the individuals named as a defendant and the deprivation of rights complained of. *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1157 (10th Cir. 2001). In another suit where a prisoner alleged that a beating he received in the hands of sheriff's deputies violated his constitutional rights, the court did dismiss claims brought against the defendants who were nowhere near the plaintiff's cell at the time of the beating, but did not dismiss claims brought against defendants who were near the cell at the time of the assault, on the grounds that it could not determine that these defendants had not personally participated in the assault. *Davis v. Hill*, 173 F. Supp. 2d 1136, 1143-44 (D. Kan. 2001). Finally, the courts purport to announce a rule that it is relatively easy to show personal participation as a pleading matter: "[w]hile the link is rather loosely demonstrated, our system of liberal pleadings persuades us to accept Appellant's allegations without parsing responsibility to the various Defendants specifically." *Stidham*, 265 F.3d at 1157.

As the foregoing suggests, the common-sense "personal participation" requirement is not a high hurdle, and merely requires some pleading connecting the defendant to the acts or omissions complained of. However, in holding that Allen Oil & Gas had not met this requirement, the Tenth Circuit not only ignored the Complaint, it also effectively imposed a heightened pleading standard not sanctioned by the rules.

Complaint Pleads Personal Participation

Beginning with the Complaint, Allen Oil & Gas plead sufficient personal participation by the Respondents to avoid having its claim dismissed. The very first allegation in the Complaint is the blunt statement that the "[Respondents] stole [Allen Oil & Gas'] oil wells." It goes on to assert more generally that the "plug and abandon" order was an unconstitutional violation of due process, and that the wells were plugged "at the direction of the [Respondents]." As set forth above, the Respondents were members of the Commission at the time the order in question was entered, and the Complaint alleged not only this fact by that it was the Respondent's order resulted in the denial of due process on which the complaint was based, and that its losses are "a result of proximate and direct actions of the [Respondents]." Finally, none of the Respondents ever professed having any difficulty understanding what Allen Oil & Gas was claiming, and none of them objected that they had not personally participated in the acts being complained of. Despite this, the Tenth Circuit found that their personal participation had not been properly plead, and dismissed the suit. This conclusion is wrong.

Decision Imposes a Heightened Pleading Burden

In effect, the decision below imposes a heightened pleading burden on litigants. No longer is it sufficient for a plaintiff to provide the "short and plain statement of the claim" required by the rules. Fed. R. Civ. P. 8(a)(2). Instead, plaintiffs who wish to avoid this personal participation hurdle will be

compelled to provide prolix and detailed pleadings of all facts that connect the defendants to the claim, lest their claim be dismissed.

Such a burden is excessive, and is unsupported by the rules and by the authority cited above. A pleading is sufficient if it provides the defendant with "fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz*, 534 U.S. at 508. Imposing a heightened standard of pleading under the guise of requiring a showing of the requisite personal participation would effectively override the provisions of Rule 8, and ends up requiring something like the heightened pleading specificity required of certain issues by Rule 9.

This Court has rejected the assertion that lower courts may impose a heightened pleading requirement for civil rights suits brought pursuant to 42 U.S.C. § 1983. *Leatherman v. Tarrant County Narcotics & Intelligence Coordination Unit*, 507 U.S. 163, 165-68 (1993). The decision of the court below effectively imposes just such a heightened pleading requirement on civil rights cases, under the guise of alleging personal participation. Permitting this decision to stand uncorrected results in not just the dismissal of a single suit, but would affirm the imposition of an improper heightened pleading standard on other civil rights suits, under the guise of requiring litigants to plead that the defendant personally participated in the acts giving rise to the suit. Because personal participation is not one of the matters for which the rules impose a heightened pleading requirement, the

Tenth Circuit's decision that leads to the same result should be rejected.

II. ALLEN OIL & GAS SHOULD HAVE BEEN AFFORDED AN OPPORTUNITY TO AMEND ITS COMPLAINT BEFORE IT WAS DISMISSED.

Alternatively, even if it were to be assumed that Allen Oil & Gas' pleadings did not alleged sufficient personal participation to state a claim against the Respondents, it should have been given the opportunity to amend its Complaint to correct this deficiency.

Amendment Should be Freely Allowed

Leave to amend a pleading should "be freely given when justice so requires." Fed. R. Civ. P. 15(a). This is especially true if dismissal is being sought. In such a case, dismissal without opportunity to amend should only happen if it may be stated "beyond doubt" that the pleadings cannot be amended to state a claim. *Czosek*, 395 U.S. at 27.

Amendment Should have been Allowed

This high burden was not met here. Allen Oil & Gas asked that in the event dismissal was found to be proper, that it be given the chance to amend its Complaint. However, the district court *sua sponte* determined that it would be futile to allow it an opportunity to amend, saying that the fact it had not already done so meant it was "reasonable to conclude

that it cannot do so." The Tenth Circuit affirmed this disposition.

If the problem with Complaint in this case is that it does not set forth how the Respondents personally participated in the events giving rise to Allen Oil & Gas' claims, then it would stand to reason that an amendment to the Complaint could clarify this deficiency. Allen Oil & Gas believes its pleadings are sufficient (as discussed above), and so its failure to amend previously does not indicate that it cannot do so, but rather that there was no need to do so until dismissal was found to be appropriate. It is not possible at this juncture to say "beyond doubt" that Allen Oil & Gas cannot amend its pleadings to clarify the Respondents' personal participation in the events described above, and so Allen Oil & Gas should have been afforded that opportunity.

CONCLUSION

For all of the foregoing reasons, the Petitioner requests this Court to grant its Petition for Writ of Certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-1082
(D.C. No. 01-N-1811)
(D. Colo.)

ALLEN OIL & GAS, LLC,

Plaintiff-Appellant,

v.

MICHAEL KLISH; BRUCE JOHNSON;
DANIEL SKRABACZ; ADRAN PHILLIPS,

Defendants-Appellees.

[ENTERED: OCTOBER 26, 2004]

ORDER AND JUDGMENT*

Before **McCONNELL**, **HOLLOWAY**, and **PORFILIO**,
Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff Allen Oil & Gas, LLC, appeals the judgment of the district court dismissing its § 1983 complaint for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) and further refusing to grant plaintiff leave to amend its complaint. We exercise jurisdiction pursuant to 28 U.S.C. § 1332 and affirm.

Plaintiff was the operator of oil leases located in Routt County, Colorado. In the complaint, defendants are identified as members of the board of the Colorado Oil and Gas Conservation Commission (Commission). Plaintiff brought suit under 42 U.S.C. § 1983 alleging that defendants affected a taking of its property without due process in derogation of the Fifth Amendment when the Commission ordered some of plaintiff's wells plugged. Specifically, plaintiff alleged, *inter alia*, that defendants denied it the opportunity for a hearing before an impartial tribunal, prevented it from complying with Commission regulations, and continued a hearing without written notice to plaintiff.

In ruling on defendants' renewed motion to dismiss the complaint, the district court held that because plaintiff failed to allege any personal participation by defendants in the allegedly illegal acts, its complaint was subject to dismissal under Rule

12(b)(6). Because the court found it "patently obvious that the plaintiff cannot prevail under the alleged facts," Aplt. App. at 164, it further denied leave to amend the complaint. Alternatively, the court held that defendants were shielded by qualified immunity.

Plaintiff takes issue with all three of these conclusions. We need not address the qualified immunity issue, however, because we find no error in the dismissal for failure to state a claim and in the refusal to allow amendment.

> This court reviews de novo the district court's dismissal under Rule 12(b)(6) for failure to state a claim. We accept as true all well-pleaded facts, as distinguished from conclusory allegations, and view those facts in the light most favorable to the nonmoving party. The district court's dismissal pursuant to Rule 12(b)(6) will be upheld only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir. 1998) (citations and quotation omitted).

In order to state a claim for relief under § 1983, plaintiff must show an affirmative link between defendants' conduct and the alleged constitutional violation. *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1156-57 (10th Cir. 2001). Here, the

complaint makes no link between these individual defendants and the acts complained of. The complaint identifies defendants as members of the Commission, Aplt. App. at 8, but does not identify them as members of the Commission during the relevant time period.[1] The complaint does not allege how any or all of the defendants voted on matters concerning the wells. The complaint does claim that activities of a particular employee of the Commission injured plaintiff, but that individual is not named as a defendant. Further, there is no allegation that any of the defendants personally considered the allegedly improper intervention of this employee or allowed it to influence them.

In its opening brief, plaintiff correctly cites the law requiring personal participation in this type of suit but fails to ultimately show that defendants were directly involved in the acts that resulted in the claimed deprivation of rights. Merely saying that it has shown individual involvement on the part of each defendant does not make it so. *See* Aplt. Br. at 17-18.

Plaintiff also correctly points to various theories of recovery which would state a claim for relief had the correct defendants been named or had these defendants been affirmatively linked to the alleged harm that befell plaintiff. Without the personal participation by each defendant, however, plaintiff's theories are of no avail. Plaintiff cites *Barrett v. Tallon*, 30 F.3d 1296, 1299 (10th Cir. 1994), for the proposition that even if the factual allegations made in a complaint

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[1] The statement in plaintiff's opening brief that the complaint alleged defendants *were* members of the Commission is inaccurate. *See* Aplt. Br. at 16.

fail to support the legal theory underlying the plaintiff's case, dismissal is inappropriate. In *Barrett*, this court reversed a dismissal under Rule 12(b)(6) because, while the plaintiffs failed to state a RICO claim, they had adequately pleaded claims of "garden variety" fraud and conversion. There is no indication in *Barrett*, however, that the plaintiffs either failed to name the correct defendants or failed to allege personal participation by them.

Plaintiff's citation to *Stidham*, 265 F.3d 1144, is similarly unavailing. In *Stidham*, one of the defendants, the director of Utah's Peace Officer Standards and Training Division, argued that the claims against him must be dismissed because the plaintiff had failed to allege an affirmative link between his conduct and any constitutional violation. This court clarified that such a link is required to be alleged in the complaint as well as proven at trial. *Id.* at 1157. We refused to affirm the dismissal of the complaint against the director, however, because the plaintiff had sufficiently alleged wrongdoing on the part of the defendants as a group and had defined the director as part of that group. *Id.*

Although not part of the published opinion in *Stidham*, the complaint there clearly alleged that the defendant director was the director at the time of the acts complained of.[2] The complaint in the case at bar does not make a similar allegation as to the named defendants and therefore does not state a claim upon which relief can be granted.

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[2] We have ascertained this fact by taking judicial notice of the appellate record in *Stidham* which is still on file in this court.

Finally, plaintiff argues that the district court erred in refusing to grant it leave to amend the complaint. In declining to grant leave to amend, the district court began by noting that defendants had pointed out plaintiff's failure to allege personal participation when they filed their motion to dismiss in the Southern District of Texas. Briefing on that motion was complete before the case was transferred to Colorado. We also note that defendants made the same argument in their renewed motion to dismiss filed in the district court on December 19, 2001. At the time of the district court's ruling here, January 24, 2003, discovery in the case was complete and the deadline for filing dispositive motions had passed without any request from plaintiff to amend the complaint. The district court concluded that "it is patently obvious that the plaintiff cannot prevail under the alleged facts and that an opportunity to amend would be futile." Aplt. App. at 164. We review this conclusion de novo. *Watson ex rel. Watson v. Becker*, 242 F.3d 1237, 1239 (10th Cir. 2001).

We have reviewed the pleadings on file in this case and the other materials of record and agree that granting leave to amend would be futile. As noted above, plaintiff does not allege any personal participation by any of the defendants in its alleged injury. Plaintiff does not dispute that three of the four defendants were not members of the Commission in March 1999 when the wells were ordered plugged. Despite being on notice that defendants would raise the issue of lack of personal participation, plaintiff did not request leave to amend its complaint until the district court was prepared to rule on defendants'

renewed motion to dismiss. Even then, the district court found the request to be rather opaque: "There is some suggestion in the papers that the plaintiff should be given leave...to replead." Aplt. App. at 163. Further, plaintiff does not indicate in its filings in this court how it would amend the complaint to cure the noted defect. Under these circumstances, we find no error in the refusal of the district court to grant leave to amend.

The judgment of the district court is AFFIRMED.

Entered for the Court

Michael W. McConnell
Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
JUDGE EDWARD W. NOTTINGHAM

Civil Action No. 01-N-1811 (MJW)

ALLEN OIL & GAS, LLC,

Plaintiff,

v.

MICHAEL KLISH,
BRUCE JOHNSON,
DANIEL SKRABACZ, and
ADRAN PHILLIPS, Individually,

Defendants.

[ENTERED: JANUARY 30, 2003]

FINAL JUDGMENT

In accordance with orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(2), the following FINAL JUDGMENT is hereby entered.

1. Pursuant to the findings of fact and conclusions of law entered orally in open court by Judge Edward W. Nottingham on January 24, 2003:

a. Defendants' Motion to Dismiss Complaint (#8), filed December 19, 2001, is GRANTED.

b. Defendants' motion for summary judgment (#31), filed June 28, 2002, is DENIED as MOOT.

c. Judgment is entered in favor of Defendants Michael Klish, Bruce Johnson, Daniel Skrabacz, and Adran Phillips and against Plaintiff Allen Oil & Gas, LLC, and Plaintiff's Complaint and this action are DISMISSED with prejudice.

6. Defendants shall have their costs upon the proper filing of a Bill of Costs within eleven days of January 24, 2003, the date of the court's order

Dated this 30 day of January, 2003.

APPROVED BY THE COURT:

/s/
EDWARD W. NOTTINGHAM
United States District Judge

ENTERED FOR THE COURT:
JAMES R. MANSPEAKER, CLERK

By /s/
Stephen P. Ehrlich
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Final Judgment signed by Judge Edward W. Nottingham on January 30, 2003 was served on January 30, 2003 by hand-delivery, where a "D.C." box number or asterisk (*) is indicated after the recipient's name, by electronic mail to the address specified where a double asterisk (**) is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

Magistrate Judge Michael J. Watanabe*

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Litigation Section
D.C. Box No. 20
Attorney for Defendants

JAMES R. MANSPEAKER, CLERK

By /s/
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-01-1004

ALLEN OIL & GAS, LLC,

Plaintiff,

v.

MICHAEL KLISH, BRUCE JOHNSON,
DANIEL SKRABACZ, AND
ADRAN PHILLIPS, Individually,

Defendant.

[ENTERED: SEPTEMBER 5, 2001]

MEMORANDUM AND ORDER OF TRANSFER

Pending is Defendants' Motion to Dismiss Or, in the Alternative, Motion to Transfer (Document No. 3). After having reviewed the motion, responses, reply, and applicable law, the Court concludes that the motion to transfer should be GRANTED.

I. Background[1]

Plaintiff Allen Oil & Gas, which operated oil leases in the State of Colorado, brought this action against members of the Oil and Gas Conservation Commission of the State of Colorado (the "Commission") individually after some of Plaintiff's Colorado oil wells were plugged at the order of the Commission. The Commission is a regulatory agency that governs the production of oil and gas in the State of Colorado. Plaintiff owned oil wells and leases in Colorado, in fields known as Tow Creek Field and Buck Peak Field. The Commission determined that some of Plaintiff's Tow Creek Field wells did not comply with the Commission's regulations, and after holding hearings on the issue, ordered the allegedly noncompliant wells plugged. The Commission also ordered Plaintiff to pay a fine and to post further bond with the Commission to continue operation of its wells in Buck Peak Field. The Commission later determined that Plaintiff's Buck Peak Field wells were uneconomic, and ordered these wells plugged as well. Plaintiff filed this action under 42 U.S.C. § 1983 against the individual members of the Colorado Commission for alleged violations of Plaintiff's substantive and procedural due process rights and for taking property without just compensation. Defendants are residents of the State of Colorado, and Plaintiff does not contend that Defendants' actions occurred outside of Colorado.

---

[1] In determining Defendant's motion to dismiss for lack of personal jurisdiction without an evidentiary hearing, the Court is required to accept all of Plaintiff's uncontroverted allegations as true and construe conflicting evidence in favor of Plaintiff. *See* Alpine View Co. v. Atlas Copco AB, 205 F.3d 208, 215 (5th Cir. 2000). This statement follows that standard.

II. Subject Matter Jurisdiction

Preliminarily, the Court addresses Defendants' challenge to the Court's subject matter jurisdiction on Eleventh Amendment immunity grounds. The Eleventh Amendment of the United States Constitution bars claims in federal courts against states and state officials in their official capacities. U.S. CONST. amend. XI; Kentucky v. Graham, 105 S. Ct. 3099, 3107 (1985). This bar is jurisdictional in nature. Edelman v. Jordan, 94 S. Ct. 1347, 1363 (1974); Burge v. Parish of St. Tammany, 187 F.3d 452, 465 (5th Cir. 1999); McDonald v. Bd. of Mississippi Levee Comm'rs, 832 F.2d 901, 906 (5th Cir. 1987). However, the Eleventh Amendment does not deprive federal courts of their jurisdiction over claims against state officials in their individual capacities. Hafer v. Melo, 112 S. Ct. 358, 365 (1991); Wilson v. UT Health Ctr., 973 F.2d 1263, 1271 (5th Cir. 1992).

Although Plaintiff sues Defendants in their individual capacities, Defendants contend that the Complaint is based on actions taken by Defendants in their official capacities as members of the Commission. Therefore, Defendants argue, Plaintiff's action is actually an official capacity suit against the State of Colorado. State officials can be held liable in their individual capacities for actions taken in their official capacities. Hafer, 112 S. Ct. at 363. The mere fact that Defendants acted as members of the Commission does not, therefore, either preclude Plaintiff from bringing individual capacity claims against Defendants or transform its claims into official capacity claims. Because Plaintiff clearly attempts to hold Defendants

liable only in their individual capacities, which the Eleventh Amendment does not bar, the Court has subject matter jurisdiction over Plaintiff's claims. *See* Hafer, 112 S. Ct. at 365. ("The Eleventh Amendment does not bar such suits [against state officials in their individual capacities], nor are state officers absolutely immune from personal liability under § 1983 solely by virtue of the 'official' nature of their acts.").

III. Personal Jurisdiction

A federal court may exercise jurisdiction over a nonresident defendant if (1) the long-arm statute of the forum state confers personal jurisdiction over that defendant; and (2) the exercise of such jurisdiction comports with due process under the United States Constitution. *See* Ruston Gas Turbines, Inc. v. Donaldson Co., 9 F.3d 415, 418 (5th Cir. 1993). Because the Texas long-arm statute has been interpreted to extend as far as due process permits, the sole inquiry is whether the exercise of personal jurisdiction over a nonresident defendant comports with federal constitutional due process requirements. *See* id.

"Exercise of personal jurisdiction over nonresident defendants satisfies due process when two requirements are met." Marathon Oil Co. v. A.G. Ruhrgas, 182 F.3d 291, 294 (5th Cir. 1999). First, the defendant must have "purposefully established 'minimum contacts' in the forum State." Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174, 2183 (1985) (*quoting* International Shoe Co. v. Washington, 66 S. Ct. 154, 158 (1945)). The "defendant's conduct and connection with the forum State [must be] such that [it]

should reasonably anticipate being haled into court there." Id. (*quoting* World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 567 (1985)). Even if such contacts are present, "these factors must be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'" Id. at 2184.

Two types of personal jurisdiction are recognized: "specific" and "general." Specific jurisdiction exists when the cause of action relates to or arises out of the defendant's contacts with the forum. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 104 S. Ct. 1868, 1872 n.8 (1984). Even a single act can support specific jurisdiction "[s]o long as it creates a substantial connection with the forum." Burger King, 105 S. Ct. at 2184 n.18 (internal quotations omitted). Alternatively, a State may exercise general jurisdiction over a defendant even though the lawsuit does not arise out of or relate to the defendant's contacts with the forum. *See* Helicopteros, 104 S. Ct. at 1872 n.9. For general jurisdiction to exist, due process requires that the nonresident's contact with the forum State be substantial, continuous, and systematic. Alpine View Co. Ltd. v. Atlas Copco AB, 205 F.3d 208, 217 (5th Cir. 2000).

"When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident." Stuart v. Spademan, 772 F.2d 1185, 1192 (5th Cir. 1985). Because no evidentiary hearing has been held in this case, however, Plaintiff bears the burden of presenting a

prima facie case of personal jurisdiction, and proof by a preponderance of the evidence is not required. *See* Kelly v. Syria Shell Petroleum Development B.V., 213 F.3d 841, 854 (5th Cir. 2000). A plaintiff may present a *prima facie* case by producing admissible evidence which, if believed, would suffice to establish the existence of personal jurisdiction. *See* WNS, Inc. v. Farrow, 884 F.2d 200, 203 (5th Cir. 1989). Uncontroverted allegations in the plaintiff's complaint must be taken as true, and conflicts between the facts contained in the parties' affidavits and other evidence must be construed in the plaintiff's favor. *See* Alpine View, 205 F.3d at 215.

Plaintiff argues that Defendants established minimum contacts with the State of Texas through communications, telephone calls, and orders sent by the Commission to Plaintiff and Plaintiff's agent in Texas. Plaintiff does not contend that the contents of these communications gave rise to its cause of action or that Defendants directed their conduct toward activities in Texas, nor has Plaintiff either alleged or produced evidence which would support such a contention. *See* Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 213 (5th Cir. 1999); Marathon Oil, 182 F.3d at 295. Without more, Defendants' exchange of communication on behalf of the Commission with a Texas limited liability company is not sufficient to support the exercise of jurisdiction over Defendants in Texas. *See* Marathon Oil, 182 F.3d at 295 (presence in Texas for three meetings, correspondence, and phone calls not sufficient to establish minimum contacts); Holt Oil & Gas Corp. v. Harvey, 801 F.2d 773, 778 (5th Cir. 1986) (exchange of communications in course of

developing contract did not establish minimum contacts); Hydrokinetics, Inc. v. Alaska Mech., Inc., 700 F.2d 1026, 1029 (5th Cir. 1983) (exchange of communications during development of contract not sufficient in itself to be characterized as purposeful activity invoking benefits and protections of forum state's laws). Defendants, as residents of Colorado and members of a Colorado regulatory agency, could not reasonably foresee being haled into a Texas court for their actions outside of Texas and relating to Colorado oil wells merely because they directed the Commission's communications with the wells' owner to the owner's place of business, which happened to be Texas. Such contacts with Texas are too random to establish personal jurisdiction over Defendants, as they rest entirely on the fortuity that the Colorado wells at issue were owned by an entity that received its mail in Texas. *See* Patterson v. Dietze, Inc., 764 F.2d 1145, 1147 (5th Cir. 1985). Because Plaintiff has failed to establish a prima facie case of personal jurisdiction over Defendants, the Court does not reach the remaining issues raised by Defendants, but turns to the issue of whether this case should be dismissed for lack of personal jurisdiction, or transferred to the District of Colorado.

IV. Alternative Requests to Transfer Venue

Plaintiff and Defendants have both requested in the alternative that this case be transferred to the United States District Court for the District of Colorado pursuant to 28 U.S.C. § 1406(a). Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or

district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). A court can transfer rather than dismiss a case under § 1406(a) even where the court lacks personal jurisdiction over the defendant. *See* Goldlawr, Inc. v. Heiman, 82 S. Ct. 913, 915-16 (1962).

Venue is improper in this district where none of Defendants resides and where none of the events occurred that give rise to this suit. On the other hand, all Defendants reside in the District of Colorado and it is there that all or a substantial part of the events or omissions giving rise to the claim occurred. *See* 28 U.S.C. § 1391(b). As residents of Colorado, all Defendants are subject to personal jurisdiction there. In the interests of justice, the Court will transfer this action to the United States District Court for the District of Colorado.

V. Order

Based on the foregoing, it is

ORDERED that this cause is TRANSFERRED pursuant to 28 U.S.C. § 1406(a) to the United States District Court for the District of Colorado, and the Clerk of the Court will effect such transfer.

The Clerk will enter this Order, providing a correct copy to all counsel of record.

SIGNED at Houston, Texas, this 4th day of September, 2001.

/s/
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-1082

ALLEN OIL & GAS, LLC,

Plaintiff - Appellant,

v.

MICHAEL KLISH; BRUCE JOHNSON;
DANIEL SKRABACZ; ADRAN PHILLIPS,

Defendants - Appellees.

[ENTERED: DECEMBER 29, 2004]

ORDER

Filed December 29, 2004

Before **McCONNELL, HOLLOWAY** and **PORFILIO,**
Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/
Deputy Clerk

Supreme Court, U.S.
FILED
JUN 2 0 2005
OFFICE OF THE CLERK

(2)

NO. 04-1304

IN THE SUPREME COURT OF THE UNITED STATES

ALLEN OIL & GAS, L.L.C.,

Petitioner,

vs.

MICHAEL KLISH, BRUCE JOHNSON, DANIEL SKRABACZ, and ADRAN PHILLIPS,

Respondents.

On Petition for Writ of Certiorari to
The United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June 20, 2005

QUESTIONS PRESENTED FOR REVIEW

1. Did the Tenth Circuit misapply the standards of Fed.R.Civ.P. 12(b)(6) when it affirmed dismissal of Allen Oil & Gas, L.L.C.'s ("AOG's") complaint for failure to state a claim on which relief could be granted?

2. Did the Tenth Circuit err when it affirmed the District Court's determination that amendment would be futile, as there are no facts which AOG could plead to support its claims?

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Respondents Michael Klish, Bruce Johnson, Daniel Skrabacz and Adran Phillips respectfully submit the following Brief in Opposition to the Petition for Writ of Certiorari:

OPINIONS BELOW

Each of the documents listed below is attached as a separately identified appendix to this Response brief.

Opinion of the Hon. Judge Edward Nottingham of the U.S. District Court for the District of Colorado, in the form of a transcript of motion hearing, for Case No. 01-CV-1811, Allen Oil & Gas, L.L.C. v. Klish, et.al., dated January 24, 2003, attached hereto as Appendix A. Final Judgment of the U.S. District Court for the District of Colorado for Case No. 01-CV-1811, dated January 30, 2003, attached hereto as Appendix B. Opinion of the U.S. Court of Appeals for the Tent Circuit in Allen Oil & Gas, L.L.C. v. Klish, et.al., 113 Fed.Appx. 869 (10th Cir. 2004), decided on October 26, 2004, attached hereto as Appendix C. Order of the U.S. Court of Appeals for the Tenth Circuit denying AOG's petition for rehearing, dated December 29, 2004, attached hereto as Appendix D.

JURISDICTION

Petitioner invoked the jurisdiction of the U.S. District Court for the District of Colorado under 28 U.S.C. §§ 1331 and 1343 for claims brought under 42 U.S.C. § 1983. The District Court below dismissed the Complaint on January 30, 2003, and Petitioners filed a timely notice of appeal on February 27, 2003. The Tenth Circuit affirmed the judgment of the District Court on October 26, 2004. Petitioner's motion for reconsideration was denied on December 29, 2004. Petitioner filed its Petition for Writ of Certiorari on March 28, 2005.

Jurisdiction to review the decision of the Tenth Circuit Court of Appeals, affirming dismissal by the U.S. District Court of AOG's complaint, is appropriate under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Fed.R.Civ.P. 12(b)(6) provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion … (6) failure to state a claim upon which relief can be granted… .

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

STATEMENT OF THE CASE

Petitioner AOG is a corporation with its principal offices in Texas. AOG operated oil wells in the State of

Colorado subject to regulation by Colorado's Oil & Gas Conservation Commission ("COGCC"). In this action, AOG sued Respondents under 42 U.S.C. § 1983. Respondents were, at various times, four members of the seven member COGCC. AOG alleged that the COGCC had deprived AOG of its property without due process.

AOG filed its initial complaint in the District Court for the Southern District of Texas, Houston Division. Respondents filed a motion to dismiss on December 19, 2001, alleging lack of personal jurisdiction and lack of subject matter jurisdiction. In their motion to dismiss in Texas, Respondents argued that AOG's complaint failed to make allegations that any of the Respondents individually participated in the alleged wrongdoing. The Texas District Court did not address the personal participation argument, but instead transferred AOG's lawsuit to the U.S. District Court for the District of Colorado.

Despite the arguments made by Respondents in Texas, AOG did not re-plead in the District of Colorado to include facts to show personal participation by the named Respondents. Respondents filed a renewed motion to dismiss AOG's Complaint, alleging, among other things, that AOG failed to allege personal participation by any named Defendant. Following the renewed motion to dismiss, AOG did not ask or attempt to amend its complaint to allege personal participation.

The parties performed extensive written and deposition discovery. Following discovery, Respondents filed a motion for summary judgment and a supplement to their motion to dismiss. As before, the motion for summary judgment pointed out AOG's failure to plead or provide evidence to support personal participation by the named Respondents. Respondents raised the defense of qualified immunity in their supplemental motion to dismiss, and argued that AOG had failed to allege personal participation

by the Respondents. On January 30, 2003, the District Court for the District of Colorado dismissed AOG's claims for failure to allege personal participation, and further found that Respondents were entitled to qualified immunity. The District Court denied AOG leave to amend its complaint, as AOG provided no facts or evidence to show how the complaint could be effectively amended.

The U.S. Court of Appeals for the Tenth Circuit affirmed dismissal of the complaint because AOG failed to allege personal participation by Respondents. The 10th Circuit pointed out that AOG was on notice of Respondents' personal participation arguments prior to transfer of this case from the Southern District of Texas to the District of Colorado. Despite such clear notice, AOG did not amend its claims against Respondents after transfer from Texas to Colorado, nor after the renewed motion to dismiss nor after Respondents' motion for summary judgment.

The 10th Circuit further confirmed that amendment would be futile, noting that although the issue was raised obliquely at the hearing on Defendant's motion for summary judgment, even then AOG did not inform the District Court how it could cure defects in the Complaint.

REASONS FOR DENYING THE WRIT

I. There Is No Need For This Court To Exercise Its Supervisory Authority In This Case.

A. Petitioner was not subjected to a heightened pleading standard.

AOG was not subjected to a "heightened" pleading standard in relation to allegations of personal participation in its complaint. Instead, the U.S. District Court determined, and the 10th Circuit affirmed, that allegations of personal participation are required to state a claim under 42 U.S.C. § 1983. App. at A-10; App. at C-5. AOG concedes in its

Petition that personal participation is a basic element of a § 1983 claim. Petition at p.9. Therefore, the U.S. District Court, in requiring AOG to plead personal participation, identified the minimum standard to be met for AOG to state a claim under § 1983.

At the hearing on Respondents' motion to dismiss, the District Court determined that AOG's complaint failed to "mention any of the defendants by name, describe acts they in particular participated in or otherwise imply that they personally were liable for plaintiff's harm." App. at A-11. This was true despite the fact that AOG "had a full opportunity for discovery… ." App. at A-18.

The District Court concluded as a matter of law that "individual liability under § 1983 must be based on personal involvement in the constitutional violation." App. at A-10. The District Court's determination is supported by applicable Tenth Circuit law. Bennett v. Passic, 545 F.2d 1260, 1262-63 (10th Cir., 1976); Mitchell v. Maynard, 80 F.3d 1433, 1441 (10th Cir., 1996); see also, Rizzo v. Goode, 423 U.S. 362, 376 (1976) (supervisor status without personal participation is not sufficient to support a claim under § 1983).

The District Court then applied Fed.R.Civ.P. 12(b)(6) standards to its findings of fact, noting that dismissal was appropriate where, as here, plaintiff could not prevail and amendment would be futile. App. at A-13. The District Court dismissed AOG's complaint because it failed to state a claim on which relief could be granted, as there were no allegations of personal participation by Respondents. Id. at A-12 & 13.

AOG appealed to the Tenth Circuit. The 10th Circuit affirmed, holding that the District Court applied the appropriate standard under Rule 12(b)(6) to its findings of fact. App. at C-3 & 4.

Apparently in recognition of the deficiency in its complaint, AOG attempted to manufacture allegations of personal participation, alleging that its complaint included the contention that the Respondents *were* members of the Commission at the time of the damaging order. See App. at C-4 & 5. The 10th Circuit pointed out that this allegation by AOG was not true. App. at C-5, fn 2.[1] The Tenth Circuit then noted that AOG admitted that "three of the four Respondents were not members of the Commission in 1999 when the wells were ordered plugged." App. at C-9.

Contrary to AOG's assertion in the Petition, neither of the Courts below held AOG to a heightened pleading standard. Instead, the Courts identified the minimum standard necessary to state a claim under § 1983, and found the complaint lacking. App. at C-6 ("Merely saying that it has shown individual involvement on the part of each defendant does not make it so). Those Courts' decisions are supported by applicable Tenth Circuit law. See, e.g., Bennett, 545 F.2d at 1262-63. Accordingly, this issue does not require this Court to exercise its supervisory authority.

B. Petitioner failed to amend its complaint despite numerous opportunities, and in any event failed to demonstrate how amendment could cure defects in its complaint.

Respondent's assertion that the U.S. District Court *sua sponte* dismissed its complaint is untrue, as AOG was provided with notice of the deficiencies in its complaint on multiple occasions over a period of years, yet refused to amend or re-plead to adequately state a claim under § 1983.

---

[1] AOG repeats its false personal participation allegation in the Petition to this Court, stating that "... Respondents were members of the Commission at the time the order in question was entered... ." See Petition at 12.

Instead, in its response to Respondents' motion for summary judgment, AOG requested, for the first time in the proceedings, leave to re-plead if its complaint was lacking. App. at C-8 to 10. Even then, AOG was unable to provide the District Court with a single fact to indicate it could remedy defects in its complaint. App. at C-10.

Ultimately, the District Court granted Respondents' motion to dismiss based on failure to plead personal participation and because Respondents were entitled to qualified immunity.[2] On appeal, the Tenth Circuit reviewed the history of the case, pointing out that Respondents noted the lack of personal participation in three separate dispositive motions dating from the inception of the lawsuit. App. at C-8 to 10. The Tenth Circuit determined that under the circumstances, it was not error to deny leave to amend. App. at C-10.[3]

Similarly, the Tenth Circuit analyzed the District Court's facts and analysis and determined that leave to amend, had it been given, would have been futile, as AOG could allege no facts in support of its claims for relief. App. at C-10. Among other examples, the Tenth Circuit noted that AOG did not dispute that three of the four Respondents were not members of the COGCC in 1999, when the order

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[2] The transcript indicates that the Court found that "personal jurisdiction" was lacking. However, this is likely an error in transcription or an inadvertent misstatement by the Court, as personal jurisdiction was not a disputed issue at that stage of the proceedings. The Court likely meant to identify "personal participation" as the crux issue, as the Court immediately went on to discuss dismissal of the complaint due to AOG's failure to allege "personal participation" by Respondents. App. at A-9.

[3] The Tenth Circuit did not address Petitioner's qualified immunity argument, as the Court affirmed dismissal under Rule 12(b)(6) for failure to state a claim. App. at C-3 & 4.

for AOG's wells to be plugged was issued. App. at C-9. Ultimately, the Tenth Circuit affirmed the District Court's finding that leave to amend, if given, would have been futile. App. at C-10.

Where, as here, a plaintiff has no ability to state a good cause of action, dismissal is appropriate without affording an opportunity to amend. Czosek v. O'Mara, 397 U.S. 25, 27-28 (1970); Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

Decisions by the courts below dismissing the case without affording Petitioner further opportunity to amend are supported in the record and under applicable law. Accordingly, no issue exists that requires this Court's supervisory powers on review.

CONCLUSION

For the reasons and upon the authorities set forth above, Respondents request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 01-N-1811

ALLEN OIL & GAS, LLC,
Plaintiff,

vs.

MICHAEL KLISH, et al.,
Defendants.

REPORTER'S TRANSCRIPT MOTION HEARING

Proceedings before the HONORABLE EDWARD W. NOTTINGHAM, Judge, United States District Court for the District of Colorado, commencing at 4:17 p.m., on the 24th day of January, 2003, in Courtroom 14, United States Courthouse, Denver, Colorado.

APPEARANCES

For the Plaintiff — CLAUDE T. ALLEN, SR.
JOE McDERMOTT, ESQ.
Allen & Allen
301 Knipp
Houston, Texas
(APPEARING VIA VIDEO CONFERENCE)

For the Defendants — WILLIAM V. ALLEN, ESQ.
Colorado Attorney General's Office
1525 Sherman Street
Denver, Colorado

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

PROCEEDINGS

THE COURT: Case No. 01-N-1811, Allen Oil & Gas, a limited liability corporation v. Michael Klish, Bruce Johnson, Daniel Skrabacz and Adrian Phillips.

I'll take the appearances of counsel, starting with plaintiff's counsel.

MR. CLAUDE ALLEN: I'm Claude T. Allen, Sr., Your Honor.

MR. McDERMOTT: Judge my name is Joe McDermott, M-c-D-E-R-M-O-T-T. I am not admitted in Colorado, but I am admitted in the Southern District in the Fifth and Eighth Circuits. With the Court's indulgence, would like to be able to assist Mr. Allen today.

THE COURT: Well, you won't be permitted to talk, but you will be permitted to assist him.

You can't appear as an advocate in this court without being admitted to this Court's bar. You may be seated.

MR. WILLIAM ALLEN: William Allen on behalf of all the defendants, Your Honor, in the state of Colorado.

THE COURT: This matter comes before the Court this afternoon on the defendants' renewed motion to dismiss the Complaint and the defendants' motion for summary judgment with incorporated legal authority.

The Court has reviewed the Complaint and the materials submitted by the parties and is of the view that oral argument this afternoon would not materially assist the Court in resolving this matter. Accordingly, the Court does not intend to permit oral argument and will rule on the papers.

This is a case alleging a violation of the plaintiff's civil rights. The plaintiff alleges that the defendants, Michael Klish, Bruce Johnson, Daniel Skrabacz, and Adrian Phillips, individually, members of the Colorado Oil and Gas Commission, stole the plaintiff's wells by plugging certain oil and gas wells.

The defendants are members of the Board of the Oil and Gas Conservation Commission of the State of Colorado. They are residents and citizens of Colorado. The Commission is the regulatory agency governing the production of oil and gas in the state of Colorado.

By way of general factual background, as alleged in the Amended Complaint, the plaintiff was the operator of oil leases located in a field referred to as the Tow Creek Field in Routt County, Colorado.

In November of 1998, after there had been a number of transactions between the parties -- that is to say, between the plaintiff and the Oil and Gas Conservation Commission -- the plaintiff received notice in the form of a recommended order that certain wells located in the Tow Creek Field did not comply with the Commission regulations.

Thereafter, there were certain further proceedings. In January of 1999, the Commission held a hearing regarding the Tow Creek Field wells. At this time,

according to the Complaint, the oil prices were the lowest in history.

According to the Commission, the Commission forced plaintiff to shut down the alleged non-compliant wells until the Commission continued on March of 1999. The hearing did continue in March of 1999, and the revised recommended order issued as a result of that hearing included a recommendation to plug plaintiff's wells that had been shut in during January, allegedly without sufficient or any findings of fact.

At the end of this hearing, the Commission made findings and entered an order directing -- directed to plaintiff regarding the operation of the Tow Creek Field.

The Commission found that the plaintiff's operation of certain main wells in that field was a violation of the Commission regulations. The Commission ordered the plaintiff's shut-in wells to be plugged, imposed a fine on the plaintiff, and ordered plaintiff to post further bond with the Commission in order to be allowed to continue operation of

wells in the Buck Peak Field, another field located in Colorado, but evidently not the subject of the complaint which was then before the Commission.

In May of 1999, plaintiffs sought to amend the application -- excuse me, filed an application to amend the Commission's March of 1999 order. The Commission set a further hearing on that application for July 8, 1999, and that was continued until August 19 and 20 of 1999.

After the August 1999 hearing, the Commission declined to amend its prior order, directing that all of the wells in the Tow Creek Field be plugged. Plaintiff alleges that during the course of the 1999 hearing on August 19, the evidence was well received by Commission Board members. According to the plaintiff, however, on August 20, the hearing went much less well for the plaintiff, and it was apparent to the plaintiff, at least, that the minds of Commission Board members had been changed.

In October of 1999, according to the Complaint, plaintiff filed for judicial review of the Commission's orders in the Colorado State District Court.

On -- in August of 2000, the plaintiff allegedly drove by its Tow Creek Field and found the Commission destroying its property, according to the Complaint. And there is no specification of how the Commission was destroying the property.

Thereafter, the Commission took action to plug wells in another field operated by the plaintiff, the ones that I've alluded to earlier, Buck Peak Field. The Commission set a hearing for the plaintiff's Buck Peak Field matter for October of 1999. The Commission -- the hearing was continued until December of 1999. And according to the Complaint, plaintiff did not receive a written notice of continuance of the hearing, and therefore, did not appear at the December hearing.

The Commission at that hearing found the operation of the Buck Peak Field uneconomic. Accordingly, the

Commission ordered that the wells be plugged in that field and fined the plaintiff.

The plaintiff's Complaint makes three claims. All of them arise under Title 42 United States Code Section 1983. The first is a claim that the defendants' act deprived plaintiff of due process of law under the Fifth and Fourteenth Amendments by taking plaintiff's property without making factual findings for all of the wells.

The second claim alleges that the defendants denied plaintiff's due process rights by denying an impartial hearing in the August of 1999 hearing.

And the third claim is a -- appears to be a substantive due process claim for the defendants' action in ordering the Tow Creek wells plugged and abandoned.

The defendants first filed a motion to dismiss, and thereafter they filed a motion for summary judgment. In the supplement to the motion to dismiss, the defendants added qualified immunity as a defense.

In their original motion to dismiss, they argue that a second claim for relief is based on the actions of a person other than defendants, namely, Rich Griebling, who was a staff person with the Commission. Second, they argue that the plaintiff's claim failed to allege personal participation by any of the defendants.

I find the defendants' arguments regarding personal jurisdiction and qualified immunity to be dispositive of this case. And, accordingly, I address only those issues and will not need to address the issues presented by the motion for summary judgment.

First, I address the question of personal participation by the defendants.

This is a curious Complaint. The Complaint is riddled with allegations concerning actions of the Oil and Gas Commission, and it refers continuously and vaguely to the Commission as having been the body doing the things of which the Complaint complains.

It is curious, therefore, that the Commission, which consists of seven members, is not sued in its official capacity, or in any other capacity, and it is also curious that only four of the seven members are sued.

The plaintiff has never explained this in the Complaint or in any of its pleadings, and the Court does not understand how personal participation can be alleged in these circumstances.

The Court concludes as a matter of law that individual liability under Section 1983 must be based on personal involvement in the constitutional violation.

The plaintiffs contend that the defendants are the members of the Commission who used their authority to deprive plaintiff of its rights and that only the Commission members whose acts violated the plaintiffs rights were sued.

Notably, the plaintiff makes a distinction between the Commission members who violated plaintiff's rights and those who did not. But nothing that the plaintiff has filed in this court indicates how the plaintiffs came by this distinction

or what the distinction might be. The plaintiff does not mention defendants' specific acts to constitute a violation of the rights.

Plaintiff's argument seems to this court to boil down to the proposition that the Commission committed acts that violated the plaintiff's rights, but these defendants were members of the Commission, and therefore, the defendants personally participated in violating the plaintiff's rights.

Notably, however, that the entire Commission did not participate in the violation of the plaintiff's rights dis --itself disproofs this line of reasoning.

The Court finds the Complaint to be sorely lacking concerning any allegations directly against the defendants personally. The Complaint does not mention any of the defendants by name, describe acts that they in particular participated in or otherwise imply that they personally were liable for plaintiff's harm.

In fact, as I have noted before, the Commission is made up of seven members, only four of whom have been

named as defendants. And the Complaint is completely without information as to why this is the case.

I conclude, therefore, that the plaintiff's Complaint fails to allege personal participation by these defendants. This suit against defendants is in their individual capacity, not in their official capacity. And so this is not, in effect, a Complaint against the Oil and Gas Commission.

Accordingly, the plaintiff needs to allege more than the fact that the defendants are members of the Commission and that the Commission violated plaintiff's rights. It has not done so.

There is some suggestion in the papers that the plaintiffs should be given leave -- that the plaintiff should be given leave to replead -- leave to replead on the ground that it can correct the defects that the Court has seen in this respect.

According to Tenth Circuit law, however, dismissal under Rule 12 without affording plaintiff an opportunity to amend is appropriate when it is patently obvious that the

plaintiff cannot prevail under the alleged facts and allowing plaintiff an opportunity to amend may be -- would be futile.

I note that the defendants made this same argument against the plaintiff when the motion to dismiss was filed in the Southern District of Texas before the case was transferred to Colorado. Briefing on the motion was complete before the case was transferred. Discovery is complete in the case, and the dispositive motion deadline has passed without any request by the plaintiff to amend the Complaint.

There is no indication that the plaintiff could amend the Complaint to allege personal participation by the defendants any more specifically than it has attempted to do so in the current Complaint.

The Court finds that it is patently obvious that the plaintiff cannot prevail under the alleged facts and that an opportunity to amend would be futile. Accordingly, the Court will grant the motion to dismiss with prejudice.

A second ground for granting the motion to dismiss is the Doctrine of Qualified Immunity. The Doctrine of

Qualified Immunity shields government officials performing discretionary functions from individual liability under Section 1983, where their actions do not violate clearly established statutory or constitutional rights of which a reasonable person might have known.

Once a defendant puts in issue the question of qualified immunity, the plaintiff bears the heavy burden of demonstrating, first, that the defendants' alleged violation -- alleged actions violated a clearly established constitutional or statutory right. And, second, that the constitutional or statutory right was clearly established at the time of the alleged violation.

The plaintiff must articulate with specificity the clearly established constitutional or statutory right at issue. It is insufficient simply to identify in the abstract a clearly established right and then allege that the defendant has violated it.

For a right to have been clearly established in this circuit, the contours of the right must be sufficiently clear that

a reasonable official would understand that what he is doing violates that right.

In the Tenth Circuit, ordinarily in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established authority from other courts must have found the law to be as the plaintiff maintains.

In the Tenth Circuit, determining qualified immunity under these legal principles is a two-step process. First, the Court must determine whether the plaintiff has met its burden of coming forward with sufficient facts to show that the defendants' actions violated a federal constitutional or statutory right.

Only when the plaintiff has done that will the Court proceed to the second step, to determine whether the right was clearly established at the time of the alleged conduct.

I conclude in these circumstances that the plaintiff has not met the first part of the test for qualified immunity, because it has failed to come forward with sufficient facts to

show that the defendants violated a federal constitutional right.

The plaintiff's Complaint does intone the verbal talismans of due process and violation of the Fourth and Fifth -- Fourteenth and Fifth Amendment, but it is devoid of specific allegations of fact, particularly with regard to the actions of these defendants, as opposed to the actions of the Commission as a whole.

As I have already noted, the Complaint does not even mention any of the defendants by name, except in the caption of the Complaint. It is devoid of specific allegations of fact, particularly with regard to the actions of the Complaint -- the defendants, as opposed to the Commission as a whole.

As I have already noted, it is particularly notable, in light of the fact that plaintiff chose to proceed only against certain Commission members, that it is not violating -- alleging a violation of clearly established rights.

The defendants, having moved to dismiss on the basis of qualified immunity, the plaintiff is obliged to come forward with additional allegations showing that each defendant violated clearly established law. Even in the response to the supplement to the motion to dismiss, plaintiff argues that it meets the first step by noting that it alleges that the defendants violated its constitutional rights, specifically that the acts of the defendant violated its due process rights to notice and an opportunity to be heard, its due process right to be heard by an impartial tribunal, and its substantive due process right to possession of its property without interference with that right under color of law.

This is simply lacking under Tenth Circuit case law in sufficient detail to meet the pleading standards in this circuit. All that the plaintiff has done is to allege in the abstract the violation of a constitutional right, without alleging why that right is applicable or without alleging that each defendant has participated in the violation.

The Court concludes that the plaintiff's Complaint in this case must be dismissed with prejudice. The plaintiff's response to the defendants' supplement, which raised the qualified immunity defense, was filed in this case after discovery was complete and after the dispositive motion deadline had passed.

Even the plaintiff's response, having had a full opportunity for discovery, fails to make specific allegations regarding the defendants' actions.

The plaintiff could have chosen to amend the Complaint or to seek to amend the Complaint. There is a request in the response to the motion to dismiss to replead if the Court finds that the Complaint is lacking. There is no indication, however, that the plaintiff has any further evidence which would support the allegations which it is making.

As the defendant points out as well, the plaintiff was present at the hearings where the alleged improper actions took place, and therefore was in possession of all the

necessary facts. At this point in the case, if plaintiff has not made sufficient allegations, it is reasonable to conclude that it cannot do so.

On the basis of those findings of fact and conclusions of law, the Court grants the motion to dismiss and dismisses the plaintiff's Complaint with prejudice.

The defendants' motion for summary judgment is denied as moot.

The defendants, if they wish, may have their costs upon the filing of a bill of costs within 11 days from today's date.

That concludes this matter.

Counsel are excused. The video conference is ended.

(Hearing concluded at 4:38 p.m.)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO JUDGE EDWARD W. NOTTINGHAM

Civil Action No. 01-N-1811 (MJW)

ALLEN OIL & GAS, LLC

Plaintiff,

v.

MICHAEL KLISH,
BRUCE JOHNSON,
DANIEL SKRABACA, and
ADRAN PHILLIPS, Individually,

Defendants,

FINAL JUDGMENT

In accordance with orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(2), the following FINAL JUDGMENT is hereby entered.

1. Pursuant to the findings of fact and conclusions of law entered orally in open court by Judge Edward W. Nottingham on January 24, 2003:

a. Defendant's Motion to Dismiss Complaint (#8), filed December 19, 2001, is GRANTED.

b. Defendants' motion for summary judgment (#31), filed June 28,2002, is DENIED as MOOT.

c. Judgment is entered in favor of Defendants Michael Klish, Bruce Johnson, Daniel Skrabacz, and Adran Phillips and against Plaintiff Allen Oil & Gas, LLC, and Plaintiff's Complaint and this action are DISMISSED with prejudice.

6. Defendants shall have their costs upon the proper filing of a Bill of Costs within eleven days of January 24, 2003, the date of the court's order.

Dated this 30th day of January, 2003.

APPROVED BY THE COURT:

_____

EDWARD W. NOTTINGHAM
United Stated District Judge

ENTERED FOR THE COURT:
JAMES R. MANSPEAKER, CLERK

By _____
Stephen P. Ehrlich
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Final Judgment signed by Judge Edward W. Nottingham on January 30, 2003 was served on January 30, 2003 by hand-delivery, where a "D.C." box number or asterisk (*) is indicated after the recipient's name, by electronic mail to the address specified where a double asterisk (**) is indicated after the recipient's name, or otherwise by depositing it in the United States mail, postage prepaid, addressed to the recipient:

Magistrate Judge Michael J Watanabe*

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Litigation Section
D.C. Box No. 20
Attorney for Defendants

JAMES R. MANSPEAKER, CLERK

By _____
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ALLEN OIL & GAS, LLC, Plaintiff-Appellant, v. MICHAEL KLISH; BRUCE JOHNSON; DANIEL SKRABACZ; ADRAN PHILLIPS, Defendants-Appellees.	No. 03-1082 (D.C. No. 01-N-1811) (D. Colo.)

ORDER AND JUDGMENT[1]

Before **McCONNELL, HOLLOWAY**, and **PORFILIO,** Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously to grant the parties'

[1] This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 20th Cir. R. 36.3.

request for a decision on the briefs without oral argument. *See Fed.* R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. Plaintiff Allen Oil & Gas, LLC, appeals the judgment of the district court dismissing its § 1983 complaint for failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) and further refusing to grant plaintiff leave to amend its complaint. We exercise jurisdiction pursuant to 28 U.S.C. § 1332 and affirm.

Plaintiff was the operator of oil leases located in Routt County, Colorado. In the complaint, defendants are identified as members of the board of the Colorado Oil and Gas Conservation Commission (Commission). Plaintiff brought suit under 42 U.S.C. § 1983 alleging that defendants affected a taking of its property without due process in derogation of the Fifth Amendment when the Commission ordered some of plaintiff's wells plugged. Specifically, plaintiff alleged, *inter alia,* that defendants denied it the opportunity for a hearing before an impartial

tribunal, prevented it from complying with Commission regulations, and continued a hearing without written notice to plaintiff.

In ruling on defendants' renewed motion to dismiss the complaint, the district court held that because plaintiff failed to allege any personal participation by defendants in the allegedly illegal acts, its complaint was subject to dismissal under Rule 12(b)(6). Because the court found it "patently obvious that the plaintiff cannot prevail under the alleged facts," Aplt. App. at 164, it further denied leave to amend the complaint. Alternatively, the court held that defendants were shielded by qualified immunity.

Plaintiff takes issue with all three of these conclusions. We need not address the qualified immunity issue, however, because we find no error in the dismissal for failure to state a claim and in the refusal to allow amendment.

> This court reviews de novo the district court's dismissal under Rule 12(b)(6) for failure to state a claim. We accept as true all well-pleaded

> facts, as distinguished from conclusory allegations, and view those facts in the light most favorable to the nonmoving party. The district court's dismissal pursuant to Rule 12(b)(6) will be upheld only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Maher v. Durango Metals, Inc., 144 F.3d 1302, 1304 (10th Cir. 1998) (citations and quotation omitted).

In order to state a claim for relief under § 1983, plaintiff must show an affirmative link between defendants' conduct and the alleged constitutional violation. *Stidham v. Peace Officer Standards & Training*, 265 F.3d 1144, 1156-57 (10th Cir. 2001). Here, the complaint makes no link between these individual defendants and the acts complained of. The complaint identifies defendants as members of the Commission, Aplt. App. at 8, but does not identify them as members of the Commission during the relevant time

period.[2] The complaint does not allege how any or all of the defendants voted on matters concerning the wells. The complaint does claim that activities of a particular employee of the Commission injured plaintiff, but that individual is not named as a defendant. Further, there is no allegation that any of the defendants personally considered the allegedly improper intervention of this employee or allowed it to influence them.

In its opening brief, plaintiff correctly cites the law requiring personal participation in this type of suit but fails to ultimately show that defendants were directly involved in the acts that resulted in the claimed deprivation of rights. Merely saying that it has shown individual involvement on the part of each defendant does not make *it so*. *See* Aplt. Br. at 17-18.

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[2] The statement in plaintiff's opening brief that the complaint alleged defendants *were* members of the Commission is inaccurate. *See* Aplt. Br.At 16.

Plaintiff also correctly points to various theories of recovery which would state a claim for relief had the correct defendants been named or had these defendants been affirmatively linked to the alleged harm that befell plaintiff. Without the personal participation by each defendant, however, plaintiff's theories are of no avail. Plaintiff cites *Barrett v. Tallon,* 30 F.3d 1296, 1299 (10th Cir. 1994), for the proposition that even if the factual allegations made in a complaint fail to support the legal theory underlying the plaintiff's case, dismissal is inappropriate. In *Barrett,* this court reversed a dismissal under Rule 12(b)(6) because, while the plaintiffs failed to state a RICO claim, they had adequately pleaded claims of "garden variety" fraud and conversion. There is no indication in *Barrett,* however, that the plaintiffs either failed to name the correct defendants or failed to allege personal participation by them. Plaintiff's citation to *Stidham,* 265 F.3d 1144, is similarly unavailing. In *Stidham,* one of the defendants, the director of Utah's Peace Officer Standards and

Training Division, argued that the claims against him must be dismissed because the plaintiff had failed to allege an affirmative link between his conduct and any constitutional violation. This court clarified that such a link is required to be alleged in the complaint as well as proven at trial. *Id.* at 1157. We refused to affirm the dismissal of the complaint against the director, however, because the plaintiff had sufficiently alleged wrongdoing on the part of the defendants as a group and had defined the director as part of that group. *Id.*

Although not part of the published opinion in *Stidham,* the complaint there clearly alleged that the defendant director was the director at the time of the acts complained of.[3] The complaint in the case at bar does not make a similar allegation as to the named defendants and therefore does not state a claim upon which relief can be granted.

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[3] We have ascertained this fact by taking judicial notice of the appellate record in *Stidham* which is still on file in this court.

Finally, plaintiff argues that the district court erred in refusing to grant it leave to amend the complaint. In declining to grant leave to amend, the district court began by noting that defendants had pointed out plaintiff's failure to allege personal participation when they filed their motion to dismiss in the Southern District of Texas. Briefing on that motion was complete before the case was transferred to Colorado. We also note that defendants made the same argument in their renewed motion to dismiss filed in the district court on December 19, 2001. At the time of the district court's ruling here, January 24, 2003, discovery in the case was complete and the deadline for filing dispositive motions had passed without any request from plaintiff to amend the complaint. The district court concluded that "it is patently obvious that the plaintiff cannot prevail under the alleged facts and that an opportunity to amend would be futile." Aplt. App. at

164. We review this conclusion de novo. *Watson ex rel. Watson v. Beckel, 242* F.3d 1237, 1239 (10th Cir. 2001).

We have reviewed the pleadings on file in this case and the other materials of record and agree that granting leave to amend would be futile. As noted above, plaintiff does not allege any personal participation by any of the defendants in its alleged injury. Plaintiff does not dispute that three of the four defendants were not members of the Commission in March 1999 when the wells were ordered plugged. Despite being on notice that defendants would raise the issue of lack of personal participation, plaintiff did not request leave to amend its complaint until the district court was prepared to rule on defendants' renewed motion to dismiss. Even then, the district court found the request to be rather opaque: "There is some suggestion in the papers that the plaintiff should be given leave . . . to replead." Aplt. App. at 163. Further, plaintiff does not indicate in its filings in this court how it would amend the complaint to cure the noted defect. Under these circumstances, we find no error in

the refusal of the district court to grant leave to amend.

The judgment of the district court is AFFIRMED.

Entered for the Court

Michael W. McConnell
Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ALLEN OIL & GAS, LLC Plaintiff – Appellant, v. MICHEAL KLISH; BRUCE JOHNSON; DANIEL SKRABACA; ADRAN PHILLIPS, Defendants - Appellees	No. 03-1082

ORDER

Filed December 29, 2005

Before **McCONNELL, HOLLOWAY** and **PORFILIO,** Circuit Judges.

Appellant's petition for rehearing is denied.

Entered for the Court

PATRICK FISHER, Clerk of Court

By:

Deputy Clerk